THE REMOVAL OF JUDGES BY LEGISLATIVE ADDRESS IN MASSACHUSETTS

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While there are many noteworthy and liberal provisions in the constitution of Massachusetts, there is one of particular interest, especially at the present time, because of the wide discussion accorded the subject with which it deals. This is a provision relating to the removal of judges, and declares that a judge of any court in Massachusetts may be removed by the governor and council on an address of the legislature. When Colonel Roosevelt said in his famous speech before the Ohio Constitutional Convention at Columbus, in speaking of the recall of judges, that he favored such a drastic method of removal as was embodied in the Massachusetts constitution, many people opened their eyes in amazement. Few, of course, had ever heard of removal by address, and fewer still, if they had heard of it, understood what was meant. Their surprise was entirely natural inasmuch as no case of removal by address has taken place in Massachusetts for more than a generation.

Constitutions are generally supposed to be dull things, and not many people read them even in these times of unremitting attack on their provisions. That is why so few have realized that in the old Bay State there exists a most effective and unusually liberal system for the speedy removal of judges. Many of the States of the Union provide for removal by address, but practically all stipulate that a two-thirds vote of both the house and the senate is necessary in order to remove the judge. This makes removal very difficult. In the State of Washington three-fourths of the members of each house must concur; but in Massachusetts a mere majority vote is sufficient. In most States the cause for removal must be stated; notice must be served on the accused and a hear-

ing must be given; but under the requirements of the Massachusetts constitution no reason need be assigned and no hearing is necessary.

Most States of the Union have superseded their original constitutions by at least one, and in the majority of cases by several new documents, each one growing longer and containing provisions relating to an increasing number of new subjects. Massachusetts, almost alone, is living under her original constitution, adopted in 1780. To be sure, she was the last of the original thirteen States to adopt a constitution, but she has held to it consistently. This has been possible because of the provision for easy amendment and because of some very broad enactments in the original document. It is not because Massachusetts is behind the times, but because the originators of the constitution were far-seeing enough to draw up a liberal and elastic document. Hers, it will be recalled, was the first constitution submitted for ratification to the vote of the people. Since 1780 it has been forty-three times amended. Two constitutional conventions have been held since that date: the people accepted nine of the fourteen amendments suggested by the convention of 1820, and rejected the entire new constitution and seven other propositions referred to them by the convention of 1853.

An attempt was made by the convention of 1820 to make the removal of judges by address more difficult. In the first place it was proposed to require a two-thirds vote of each branch of the legislature instead of a majority, and the committee of the convention which had this matter in charge reported accordingly. The report was rejected, however, by the convention.

Daniel Webster, in speaking of this subject before the convention, assumed that removal could take place without trial or accusation. He said: "If the judges, in fact, hold their office only so long as the legislature sees fit, then it is vain and illusory to say that the judges are independent men incapable of being influenced by hope or by fear; but the tenure of their office is not independent. The general theory and principle of the government is broken in upon by giving the legislature this power. The departments of government are not equal, coördinate and inde-

pendent while one is thus at the mercy of the others. What would be said of a proposition to authorize the governor or judges to remove a senator or member of the house of representatives from office?" Lemuel Shaw, afterwards chief justice of Massachusetts, said in addressing the convention: "By the constitution as it stands, the judges hold their offices at the will of the majority of the legislature."

After much debate an amendment was adopted by the convention requiring that the cause assigned for the removal of any judge should be placed on record in the branch where the action originated, and that notice should be served on the accused person in order that he might have an opportunity to be heard. This amendment was submitted to the people in the same article with a provision to strike from the constitution the clause giving the governor and the two houses of the legislature the right to ask, upon important questions of law and on solemn occasions, the opinion of the judges of the supreme judicial court. The people rejected the article. Possibly if these two suggestions had not been put together, but had been divided so that one might have been accepted or rejected without the other, the vote would have been different.

There has been a good deal of dispute as to whether this clause of the Massachusetts constitution, which provides for removal of judges by address, went any further than to cover removal for incapacity. It was because of incapacity that Judge Bradbury was removed by address in 1803. He had become enfeebled by age and unfit to do his work. We have noted the statements made by leading lawyers, such as Daniel Webster and Chief Justice Shaw in the convention of 1820, and the general assumption that removal could be made for any whim. In view of this, and in the light of the actual experience of the commonwealth in the matter of removal by address, there seems no doubt that at present a judicial removal can be made for any cause, or for no cause.

Let us glance at some of the cases which have arisen in Massachusetts. There have been a number of them. Besides Mr. Justice Bradbury two judges of the court of common pleas were

removed by address in 1803 for extortion in office, and two justices of the peace were removed in 1876. The most famous cases, however, are those of Mr. Loring, judge of the probate court for the County of Suffolk, and of Mr. Day, judge of the probate court for the County of Barnstable. In both these cases hearings were given, but only because this was a general custom. The course of procedure followed the usual method governing legislation. A petition was introduced for the removal of the judges. The petition was referred to a committee—in the Loring case to the committee on federal relations, and in the Day case to a special committee. These committees then sat and heard the evidence for and against removal, together with the arguments of counsel; after which in due time they reported to the legislature. This report, of course, had to be acted upon by both house and senate. If the committees favored removal they said so at the end of their reports; then they further recommended that a joint committee, consisting of two members from the senate and five from the house, be appointed to present the address to the governor. Full reasons for the removal were given in the report of the committee, and dissenters were allowed to file a report of their own. When the house and the senate adopted the report, the address was taken by this special committee to the governor. In the case of Judge Loring the address read as follows: "The two branches of the legislature in general court assembled respectfully request that your Excellency would be pleased by and with the advice and consent of the council to remove Edward Greeley Loring from the office of judge of the probate court for the County of Suffolk." When the address went to the governor, therefore, it consisted merely of a request for removal of the judge, and did not state any reasons as did the report of the legislative committee. The governor, after the receipt of the address, presents the question of removal to the council, and if the council and the governor favor it the latter issues a writ of removal, sending a message to the legislature to inform them of the fact that removal has taken place.

These two cases came up in successive years. Judge Loring was not only judge of probate, but held also a commission from

the federal government as United States commissioner. In the latter capacity he signed a warrant for the rendition of Anthony Burns. This act created a furor; the legislature was appealed to; long hearings were held at which distinguished counsel represented both sides; and the two houses voted an address to the governor and council. Governor Gardner, however, sent back a message to the legislature refusing to remove Judge Loring, and during the remainder of this governor's term no further address was sent to him. But in 1858, on Governor Banks taking office, the legislature sent an address to him requesting the removal of Judge Loring as judge of probate. The new governor acceded to the request, on the ground that the legislature had passed an act declaring that no person should be both a Massachusetts judge and a United States commissioner. No reasons were assigned in either of the addresses, but in their messages both Governor Gardner and Governor Banks gave their reasons—in one, of the causes for not removing, and in the other for removing the judge.

In the case of Mr. Day several hearings were held, and all the accusations against him were thoroughly investigated. In 1881, the first time the case came up, the committee reported against removing Judge Day and their report was sustained by the legislature. In 1882 a committee voted in favor of removal, both houses voted for removal, and the governor removed him accordingly. No reasons were given by the legislature in their address to the governor and none were given by him in acceding to the request. Even as late as this case a petition was signed by leading members of the bar asking that the opinion of the supreme court be requested as to the right of removal by address for any cause except mental or physical incapacity. This suggestion, however, was not acted upon. Whatever the intention of the framers of the constitution may have been, there seems no doubt from the language used, which is without limitation, that removal by address is quite unrestricted.

Let us now glance for a moment at the factors surrounding the making of the Massachusetts constitution. The constitutional convention of 1779 met in Cambridge in the old church near where Dane Hall now stands. A committee of thirty was chosen to draft a constitution. This committee appointed a sub-com-

mittee of three, and the sub-committee of three—consisting of James Bowdoin, Samuel Adams, and John Adams—left the drafting of the document to John Adams. The constitution as adopted was, with some changes, his handiwork. In his voluminous works, though he speaks in detail of many of the sections, he throws no light on the particular provision for removal of judges by address. That clause, like many others, was taken from the British system of government, where, out of the original power of the king to remove judges, there developed the provision in the Act of Settlement that they could be removed by the king on address made to him by parliament. No hearing was provided for and no restriction was placed on the cause of removal. The power of the king to remove judges arbitrarily and alone was taken from him—that was all. As in Great Britain a hearing has been usual on petitions for removal by address, so in Massachusetts the people's sense of justice and their demand for fair play will always guarantee the accused a proper hearing. Judicial removals both in England and in America have been far from numerous. Where a serious offense is alleged, impeachment is the logical procedure. But so far as precedent goes in either country, any cause may be alleged (not alone disability) to justify removal by address.

Because the judges in Massachusetts have so seldom abused their power; because the people feel that they are so invariably men of uprightness and great learning; because they know that only through stability and security of tenure of office, regardless of fear of political cliques and parties, can justice be maintained; because of the liberal method for removing judges provided in its constitution, there has not been, nor do I think there is today, any great popular demand either for the recall of judges or of judicial decisions in that commonwealth. Strange to say, it has been in states where judges are elected that the complaints against their decisions have arisen. Goodness knows there have been too many examples of the viciousness of this policy of having judges dependent for their positions on the bidding of political chiefs to want to take the risk of extending the system! A very fair solution of our nation-wide problems in this regard might be had by the extension of the Massachusetts provision to other States.